803 KAR 1:060. Overtime pay requirements.

RELATES TO: KRS 337.285
STATUTORY AUTHORITY: KRS 337.295
NECESSITY, FUNCTION, AND CONFORMITY: This administrative regulation constitutes the official interpretations of the Office of Workplace Standards, Department of Labor, with respect to the meaning and application of the overtime pay requirements contained in KRS 337.285. It is the function of this administrative regulation to make available in one place the interpretations of these provisions which will guide the Office of Workplace Standards in the performance of its duties under the law unless and until it is otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect.

Section 1. Application of Overtime Provisions Generally. Since there is no absolute limitation in KRS 337.285 on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit, so long as the required overtime compensation is paid him for hours worked in excess of forty (40) hours as prescribed in KRS 337.285. This statute does not require, however, that an employee be paid overtime compensation for hours in excess of eight (8) per day, or for work on Saturdays, Sundays, holidays or regular days of rest. If no more than forty (40) hours are actually worked in the workweek, overtime compensation pursuant to KRS 337.285 need not be paid. Nothing in the statute, however, will relieve an employer of any obligation he may have assumed by contract or of any obligation imposed by other state or federal laws to limit overtime hours of work or to pay premium rates for work in excess of a daily standard or for work on Saturdays, Sundays, holidays, or other periods outside of or in excess of the normal or regular workweek or work day.

Section 2. The Workweek as the Basis for Applying KRS 337.285. If in any workweek an employee is covered by KRS 337.285 and is not exempt from its overtime pay requirements, the employer must total all the hours worked by the employee for him in that workweek, and pay overtime compensation for each hour worked in excess of the forty (40) hours.

Section 3. Each Workweek Stands Alone. The statute takes a single workweek as its standard and does not permit averaging of hours over two (2) or more weeks. Thus, if an employee works thirty (30) hours one week and the fifty (50) hours the next, he must receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked in the two (2) weeks is forty (40). This is true regardless of whether the employee works on a standard or swing-shift schedule and regardless of whether he is paid on a daily, weekly, biweekly, monthly, or other basis. The rule is also applicable to pieceworkers and employees paid on a commission basis. It is therefore necessary to determine the hours worked and the compensation earned by pieceworkers and commission employees on a weekly basis.

Section 4. Determining the Workweek. An employee's workweek is a fixed and regularly recurring period of 168 hours, seven (7) consecutive twenty-four (24) hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under this statute, a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is no designed to evade the overtime requirements of the statute. The proper method of computing overtime pay in a period in which a change in the time of

commencement of the workweek is made, is explained in Section 12 of this administrative regulation.

Section 5. General Standard for Overtime Pay. The general overtime pay standard in KRS 337.285 requires that overtime must be compensated at a rate not less than one and one-half (1 1/2) times the hourly rate at which the employee is employed may in no event be less than the statutory minimum. If the employee's hourly rate of pay is higher than the statutory minimum, his overtime compensation must be computed at a rate not less than one and one-half (1 1/2) times such higher rate.

Section 6. The overtime compensation is an hourly rate. The overtime compensation under KRS 337.285 is based on the rate per hour. The statute does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the hourly rate of such employees during each workweek. The hourly rate of pay of an employee is determined by dividing his total remuneration for employment in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The following section gives some examples of the proper method of determining the regular hourly rate of pay in particular instances.

Section 7. (1) Hour rate employee. If the employee is employed solely on the basis of a single hourly rate the overtime work he must be paid, in addition to his straight-time hourly earnings, a sum determined by multiplying one-half (1/2) the hourly rate by the number of hours worked in excess of forty (40) in the workweek. If the employee receives, in addition to his earnings at the hourly rate, an additional production bonus, the overtime must be paid on the total hourly rate received by the employee. This would be computed by adding the additional pay to the regular hourly rate and dividing by the total number of hours worked.

(2) Pieceworker. When an employee is employed on a piece-rate basis, his hourly rate of pay is computed by adding together his total earnings for the workweek from piece rate and all other sources. This sum is then divided by the number of hours worked in the week for which compensation was paid, to yield the pieceworker's hourly rate for that week. For his overtime work the pieceworker is entitled to be paid, in addition to this total weekly earnings at this hourly rate for all hours worked, a sum equivalent to one-half (1/2) this rate of pay multiplied by the number of hours worked in excess of forty (40) in the week.

(3) Day rates and job rates. If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his hourly rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of forty (40) in the workweek.

(4) Salaried employee.

(a) If the employee is employed solely on a weekly salary basis, his hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of seventy (70) dollars and it is understood that this salary is compensation for a regular workweek of thirty-five (35) hours, the employee's rate of pay is seventy (70) divided by thirty-five (35) hours, or two (2) dollars an hour, and when he works overtime he is entitled to receive two (2) dollars for each of the forty (40) hours and three (3) dollars for each hour thereafter. If an employee is hired at a salary of seventy (70) dollars

for a forty (40) hour week, his rate is one (1) dollar and seventy-five (75) cents an hour.

(b) Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by twelve (12) (the number of months) and dividing by fifty-two (52) (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by twenty-four (24) and dividing by fifty-two (52). Once the weekly wage is arrived at, the hourly rate of pay will be calculated as indicated in the previous paragraph. An alternative method may be used to compute the hourly rate by dividing the monthly salary by the number of working days in the month and then by the number of hours of the normal or regular workday. Of course, the resultant rate in such a case must not be less than the statutory minimum wage.

(c)1. An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working forty (40) hours or some other fixed weekly work period, such a salary arrangement is permitted if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half (1/2) his rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular hourly rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime at one-half (1/2) such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time rate, under the salary arrangement.

2. The application of the principles stated in the previous paragraph may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of fifty (50) hours in a workweek, and whose salary of eighty (80) dollars a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of four (4) weeks this employee works forty (40), forty-four (44), fifty (50), and forty-eight (48) hours, his hourly rate of pay in each of these weeks is $2, $1.818, $1.60, and $1.667, respectively. Since the employee has already received straight-time compensation on a salary basis for all hour worked, only additional half-time pay is due.

3. The fluctuating workweek method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the applicable minimum wage, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the law, in requiring that not less than the prescribed premium of fifty (50) percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the law cannot be rested on any applica-

tion of the fluctuating workweek overtime formula.

(5) Employees working at two (2) or more rates. Where an employee in a single workweek works at two (2) or more different types of work for which different nonovertime rates of pay have been established, his hourly rate for that week is the weighted average of such rates. That is, his total earnings are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs.

(6) Payments other than cash. Where payments are made to employees in the form of goods or facilities which are regarded as part of wages, the reasonable cost to the employer or the fair value of such goods or of furnishing such facilities must be included in the hourly rate. Where, for example, an employer furnishes lodging to his employees in addition to cash wages, the reasonable cost or the fair value of the lodging must be added to the cash wages before the hourly rate is determined.

(7) Commission payments.

(a) Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on some other formula) are payments for hours worked and must be included in the hourly rate. This is true regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis, and regardless of the method, frequency, or regularity of computing, allocating and paying the commission. It does not matter whether the commission earnings are computed daily, weekly, biweekly, semimonthly, monthly, or at some other interval. The fact that the commission is paid on a basis other than weekly, and that payment is delayed for a time past the employee's normal payday or pay period, does not excuse the employer from including this payment in the employee's hourly rate.

(b) When the commission is paid on a weekly basis, it is added to the employee's other earnings for that workweek, and the total is divided by the total number of hours worked in the workweek to obtain the employee's hourly rate for the particular workweek. The employee must then be paid extra compensation at one-half (1/2) of that rate for each hour worked in excess of forty (40) hours in the workweek.

(c) If the calculation and payment of the commission cannot be completed until sometime after the regular payday for the workweek, the employer may disregard the commission in computing the hourly rate until the amount of commission can be ascertained. Until that is done he may pay compensation for overtime at a rate of not less than one and one-half (1 1/2) the hourly rate paid the employee, exclusive of the commission. When the commission can be computed and paid, additional overtime compensation due by reason of the inclusion of the commission in the employee's regular hourly rate must be paid. To compute this additional overtime compensation, it is necessary, as a general rule, that the commission be apportioned back over the workweeks of the period during which it was earned. The employee must then receive additional overtime compensation for each week during the period in which he worked in excess of the forty (40) hours. The additional compensation for that workweek must be not less than one-half (1/2) of the increase in the hourly rate of pay attributable to the commission for that week multiplied by the number of hours worked in excess of the forty (40) hours in that workweek.

(d) If it is not possible or practicable to allocate the commission among the workweeks or the period in proportion to the amount of commission actually earned or reasonably presumed to be earned each week, some other reasonable and equitable method must be adopted. The following methods must be used:

1. Allocation of equal amounts to each week. Assume that the employee earned an equal amount of commission in each week of the commission computation period and compute any additional overtime compensation due on this amount. This may be done as follows: For a commission computation period of one (1) month, multiply the commission payment by twelve (12) and divide by fifty-two (52) to get the amount of commission allocable to a single week. If there is a semimonthly com-

putation period, multiply the commission payment by twenty-four (24) and divide by fifty-two (52) to get each week's commission. For a commission computation period of a specific number of workweeks, such as every four (4) weeks (as distinguished from every month) divide the total amount of commission by the number of weeks for which it represents additional compensation to get the amount of commission allocable to each week. Once the amount of commission allocable to a workweek has been ascertained for each week in which overtime was worked, the commission for that week is divided by the total number of hours worked in that week, to get the increase in the hourly rate. Additional overtime due is computed by multiplying one-half (1/2) of this figure by the number of overtime hours worked in the week.

2. Allocation of equal amounts to each hour worked. If there are facts which make it inappropriate to assume equal commission earnings for each workweek, assume that the employee earned an equal amount of commission in each hour that he worked during the commission computation period, and divide the amount of the commission payment by the number of hours worked in the period to obtain the amount of increase in the regular rate allocable to the commission payment. One-half (1/2) of this figure should be multiplied by the number of overtime hours worked by the employee in the overtime workweek of the commission computation period to get the amount of additional overtime compensation due for this period.

3. If there are delays in crediting sales or debiting returns or allowances which affect the computation of commissions, the amounts paid to the employee for the computation period will be accepted as the total commission earnings of the employee during such period, and the commission may be allocated over the period from the last commission computation date to the present commission computation date, even though there may be credits or debits resulting from work which actually occurred during a previous period. The hourly increase resulting from the commission may be computed as outlined in the preceding paragraphs pertaining to commission payments.

(8) Other methods of determining the regular hourly rate are permitted as long as they provide for each employee employed by an employer to be paid a rate of not less than one and one-half (1 1/2) times the hourly rate at which the employee is employed and does not attempt to evade the provisions of KRS 337.285.

Section 8. Payments Excluded From Computing Hourly Rate. As used in KRS 337.285 the "hourly rate at which he is employed" shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include:

(1) Sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency. Such sums may not, however, be credited toward overtime compensation due under the statute. To qualify for this exclusion the bonus must be actually a gift or in the nature of a gift. If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is not longer to be considered as in the nature of a gift. If the payment is so substantial that it can be assumed that employees consider it a part of the wages for which they work, the bonus cannot be considered to be in the nature of a gift. Obviously, if the bonus is paid pursuant to contract, it is not in the nature of a gift.

(2) Payments made for occasionally period when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment. However, since such payments are not made as compensation for the employee's hours worked in any workweek, no part of such payments can be credited toward overtime compensation due under the statute.

(3) Sums paid in recognition of services performed during a given period if either:

(a) Both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or

(b) The payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan.

Such sums may not, however, be credited toward overtime compensation due under the statute. In order for a bonus to qualify for exclusion as a discretionary bonus the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum to be paid as a bonus is determined by the employer without prior promise or agreement. The employee has no contract right, express or implied, to any amount. If the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it.

(4) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees. Such sums may not, however, be credited toward overtime compensation under the statute.

(5) Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight (8) in a day or in excess of the maximum workweek applicable to such employee's normal working hours. Extra compensation paid for these hours shall be creditable toward overtime compensation under the statute.

(6) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regulation days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half (1 1/2) times the rate established in good faith for like work performed in nonovertime hours on other days. Extra compensation paid for these hours shall be creditable toward overtime compensation under the statute.

(7) Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday, where such premium rate is not less than one and one-half (1 1/2) times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek. Extra compensation paid for these hours shall be creditable toward overtime compensation under the statute.

Section 9. Requirements of a "Bona Fide Profit-sharing Plan or Trust." (1) A bona fide profit-sharing plan or trust is required to meet all of the standards set forth in the following paragraphs:

(a) The profit sharing plan or trust constitutes a definite program or arrangement in writing, communicated or made available to the employees, which is established and maintained in good faith for the purpose of distributing to the employees a share of profits as additional remuneration over and above the wages or salaries paid to employees which wages or salaries are not dependent upon or influenced by the existence of such profit-sharing plan or trust or the amount of the payments made pursuant thereto.

(b) All contributions or allocations by the employer in the fund or trust to be distributed to the employees are:

1. Derived solely from profits of the employer's business as a whole, or an established branch or division of the business which is recognized as such for general business purposes and for which profits are separately and regularly calculated in accordance with accepted accounting practice; and

2. Made periodically, but not more frequently than is customary or consonant with accepted accounting practice to make periodic determinations of profit.

(c) Eligibility to share in profits extends:

1. At least to all employees who are subject to the minimum wage and overtime provisions of the act, or to all such employees in an established part of the employer's business as described in paragraph (b) of this subsection: provided, however, that such eligibility may be determined by factors such as length of service or minimum schedule of hours or days of work which are specified in the plan or trust, and further, that eligibility need not extend to officers of the employer; or

2. To such classifications of employees as the employer may designate with the approval of the executive director upon a finding, after notice to interested persons, including employee representatives, and an opportunity to present their views either orally or in writing.

(d) The amounts paid to individual employees are determined in accordance with a definite formula or method of calculation specified in the plan or trust. The formula or method of calculation may be based on any one or more of such factors as straight-time earnings, total earnings, base rate of pay of the employee, straight-time hours or total hours worked by employees, or length of service, or distribution may be made on a per capita basis.

(e) An employee's total share determined in accordance with paragraph (d) of this subsection may not be diminished because of any other remuneration received by him.

(f) Provision is made either for payment to the individual employees of their respective shares of profits within a reasonable period after the determination of the amount of profits to be distributed, or for the irrevocable deposit by the employer of his employee's distributive shares of profits with a trustee for deferred distribution to such employees of their respective shares after a stated period of time or upon the occurrence of appropriate contingencies specified in the plan or trust; provided, however, that the right of an employee to receive his share is not made dependent upon his continuing in the employ of the employer after the period for which the determination of profits has been made.

(2) No plan or trust which contains any one (1) of the following provisions shall be deemed to meet the requirements of a bona fide profit-sharing plan or trust:

(a) If the share of any individual employee is determined in substance on the basis of attendance, quality or quantity of work, rate of production, or efficiency;

(b) If the amount to be paid periodically by the employer into the fund or trust to be distributed to the employees is a fixed sum;

(c) If periodic payments of minimum amounts to the employees are guaranteed by the employer;

(d) If any individual employee's share, by the terms of the plan or trust, is set at a predetermined fixed sum or is so limited as to provide in effect for the payment of a fixed sum, or is limited to or set at a predetermined specified rate per hour or other unit of work or worktime;

(e) If the employer's contributions or allocations to the fund or trust to be distributed to the employees are based on factors other than profits such as hours of work, production, efficiency, sales or savings in cost.

(3) As used in this section a "profit-sharing plan" means any such program or arrangement as qualifies hereunder which provides for the distribution by the employer to his employees of their respective shares of profits; and "profit-sharing trust" means any such program or arrangement as qualifies under this part which provides for the irrevocable deposit by the employer of his employee's distributive shares of profits with a trustee for deferred distribution to such employees of their respective shares.

Section 10. Requirements of a "Bona Fide Thrift or Savings Plan." (1) A bona fide thrift or savings plan is required to meet all of the standards set forth in the following paragraphs:

(a) The thrift or savings plan constitutes a definite program or arrangement in writing, adopted by the employer or by contract as a result of collective bargaining and communicated or made available to the employees, which is established and maintained, in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regu-

larly and retain cash savings for a reasonable period of time or to save through the regular purchase of public or private securities.

(b) The plan specifically shall set forth the category or categories of employees participating and the basis of their eligibility. Eligibility may not be based on such factors as hours of work, production, or efficiency of the employees; provided, however, that hours of work may be used to determine eligibility of part-time or casual employees.

(c) The amount any employee may save under the plan shall be specified in the plan or determined in accordance with a definite formula specified in the plan, which formula may be based on one or more factors such as the straight-time earnings or total earnings, base rate of pay, or length of service of the employee.

(d) The employer's total contribution in any year may not exceed fifteen (15) percent of the participating employees' total earnings during that year. In addition, the employer's total contribution in any year may not exceed the total amount saved or invested by the participating employees during that year; provided, however, that a plan permitting a greater contribution may be submitted to the executive director and approved by him as a bona fide thrift or savings plan.

(e) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation specified in the plan, which formula or method of calculation is based on the amount saved or the length of time the individual employee retains his savings or investment in the plan; provided, that no employee's share determined because of any other remuneration received by him.

(2)(a) No employee's participation in the plan shall be on other than a voluntary basis.

(b) No employee's wages or salary shall be dependent upon or influenced by the existence of such thrift or savings plan or the employer's contributions thereto.

(c) The amounts any employee may save under the plan, or the amounts paid by the employer under the plan may not be based upon the employee's hours of work, production or efficiency.

Section 11. Conditions for Exclusion of Benefit-plan Contributions under Section 8(4) of this Administrative Regulation. (1) In order for an employer's contribution to qualify for exclusion from the regular hourly rate the following conditions must be met:

(a) The contributions must be made pursuant to a specific plan or program adopted by the employer, or by contract as a result of collective bargaining, and communicated to the employees. This may be either a company-financed plan or an employer-employee contributory plan.

(b) The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and the like.

(c) In the plan or trust, either:

1.The benefits must be specified or definitely determinable on an actuarial basis; or

2. There must be both a definite formula for determining the amount to be contributed by the employer and a definite formula for determining the benefits for each of the employees participating in the plan; or

3. There must be both a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method which is consistent with the purposes of the plan or trust.

(d) The employer's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that in no event will the employer be able to recapture any of the contributions paid in nor in any way divert the funds to his own use or benefit. (It should also be noted that in the case of joint employer-employee contributory plans, where the employee contributions are not paid over to a

third person or to a trustee unaffiliated with the employer, violations of the statute may result if the employee contributions cut into the required minimum or overtime wages.) Although an employer's contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the employer of such sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of making payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained.

(e) The plan must not give an employee the right to assign his benefits under the plan nor the option to receive any part of the employer's contributions in cash instead of the benefits under the plan; provided, however, that if a plan otherwise qualifies as a bona fide benefit plan, it will still be regarded as a bona fide part thereof, for the payment to an employee in cash of all or a part of the amount standing to his credit:

1. At the time of the severance of the employment relation due to causes other than retirement, disability, or death; or

2. Upon proper termination of the plan; or

3. During the course of his employment under circumstances specified in the plan and not inconsistent with the general purposes of the plan to provide the benefits.

(2) Where the benefit plan or trust has been approved by the Bureau of Internal Revenue as satisfying the requirements of section 401(1) of the Internal Revenue Code in the absence of evidence to the contrary, the plan or trust will be considered to meet the conditions specified in subsection (1)(a), (d) and (e) of this section.

Section 12. Overlapping when Change of Workweek is Made. (1) As stated in Section 4 of this administrative regulation, the beginning of the workweek may be changed for an employee of for a group of employees if the change is intended to be permanent and is not designed to evade the overtime requirements of the statute. A change in the workweek necessarily results in a situation in which one or more hours or days fall in both the old workweek as previously constituted and the new workweek. Thus, if the workweek in a plant commenced at 7 a.m. on Monday and it is now proposed to begin the workweek at 7 a.m. on Sunday, the hours worked from 7 a.m. Sunday to 7 a.m. Monday will constitute both the last hours of the old workweek and the first hours of the newly established workweek.

(2) When the beginning of the workweek is changed, if the hours which fall within both old and new workweeks as explained in the subsection (1) of this section are hours in which the employee does no work, his overtime compensation for each workweek is, of course, determinable in precisely the same manner as it would be if no overlap existed. If, on the other hand, some of the employee's working time falls within hours which are included in both workweeks, the Department of Labor, as an enforcement policy, will assume that the overtime requirements of the statute have been satisfied if computation is made as follows:

(a) Assume first that the overlapping hours are to be counted as hours worked only in the old workweek and not in the new; compute straight-time and overtime compensation due for each of the two (2) workweeks on this basis and total their sums.

(b) Assume now that the overlapping hours are to be counted as hours worked only in the new workweek and not in the old, and complete the total computation accordingly.

(c) Pay the employee an amount not less than the greater of the amounts computed by methods in paragraphs (a) and (b) of this subsection. (LAB-7, 13; 1 Ky.R. 251; Am. 451; eff. 1-8-1975; TAm eff. 8-9-2007.)